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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of SHERRY and DANIEL J. ADLER, JR.

SHERRY ADLER,

Respondent,

v.

DANIEL J. ADLER, JR.,

Appellant;

ORANGE COUNTY DEPARTMENT OF CHILD SUPPORT SERVICES,

Respondent.

G044573

(Super. Ct. No. 02D008862)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Barry S. Michaelson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Affirmed in part, reversed in part, and remanded.

Daniel J. Adler, Jr., in pro. per., for Appellant.

Sherry Adler, in pro. per., for Respondent Sherry Adler.

Kamala D. Harris, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Ismael A. Castro and Mary Dahlberg, Deputy Attorneys General, for Respondent Orange County Department of Child Support Services.

* * *

INTRODUCTION

Sherry Adler (Sherry) filed for dissolution of marriage from her husband, Daniel J. Adler, Jr. (Daniel), nearly 10 years ago.[1] They have been engaged in relentless and intense litigation ever since. The subject of this appeal is an order entered on November 3, 2010, finding that Daniel owed Sherry $34,695.61 in support arrearages and denying Daniel's order to show cause for modification of child support. The Attorney General, on behalf of the Orange County Department of Child Support Services (DCSS), has appeared and filed a brief in the public interest pursuant to Family Code section 17407.[2]

Daniel contends Sherry waived spousal support arrearages at a prior hearing. The trial court found no waiver, and Daniel, who filed a brief with no record references, has forfeited any argument that finding is not supported by substantial evidence. Consequently, we affirm the November 3, 2010 order on the matter of spousal support arrearages.

The portion of the order denying Daniel's order to show cause for modification of child support must be reversed and the matter remanded. In denying Daniel's order to show cause, the trial court departed substantially upward from the amount of child support established by the guideline formula of section 4055,

[1] We refer to Daniel Adler as Daniel and Sherry Adler as Sherry to avoid confusion, not out of disrespect.

[2] Further code references are to the Family Code unless otherwise indicated.

subdivision (b) and justified this upward departure only with the circumstance that Daniel had the ability to pay the higher amount. We conclude one parent's ability to pay alone is not a special circumstance under section 4057, subdivision (b) (section 4057(b)) rebutting the presumption the amount of child support established by the guideline formula is correct and permitting a departure from the presumptively correct amount. In addition, the trial court failed to state whether the reasons for the amount of support ordered were consistent with the children's best interests.

FACTS AND PROCEDURAL HISTORY

I.

Early Child Support Orders

Sherry filed this dissolution action in September 2002. Sherry and Daniel have two minor children. Custody is not an issue in this appeal.

After a hearing conducted in March 2003, a formal child support order was entered in June 2003 (the order is attached as an exhibit to a filing made by Daniel in November 2009). The court ordered monthly child support of $3,037 and monthly spousal support of $2,700 beginning on April 1, 2003. These orders were made retroactive to October 9, 2002, thereby creating an immediate arrearage of $32,941.48 ($17,438.25 allocated to child support and $15,503.23 allocated to spousal support). Daniel was ordered to pay $2,000 per month, commencing on April 1, 2003, in payment of the arrearage, with simple interest accruing at an annual rate of 10 percent.

In April 2003, before entry of the formal child support order, Daniel filed a motion to modify child support. In the clerk's transcript appears an unsigned order entitled "Rulings on Submitted Matters and Statement of Decision," filed on April 5, 2005, that appears to rule on Daniel's motion. The order included a detailed breakdown of child support owed each month from May 1, 2003 through April 1, 2005 and ordered ongoing support of $495 per month from the latter date. The order reduced spousal

support to $500 per month starting on May 1, 2003 and terminating on September 1, 2003. In the order, the court retained jurisdiction over spousal support. The order did not adjudicate arrearages. A signed order does not appear in the record.

In October 2006, Commissioner James Waltz modified Daniel's child support obligation to $278 per month beginning in September 2006. The court minutes and order do not address child support arrearages, spousal support, or spousal support arrearages.

II.

Daniel's Bankruptcy

In May 2004, Daniel filed for chapter 13 bankruptcy protection (later converted to chapter 7). In June 2004, Sherry filed a proof of claim for "[a]limony, maintenance, or support owed to a spouse, former spouse, or child" in the amount of $115,670.35 and, in May 2005, amended the claim to $68,978.79.

In 2005, the DCSS intercepted an IRS tax refund payment to Daniel and forwarded a check to Sherry in the amount of $85,324.44 to pay support arrearages. The bankruptcy trustee learned of the seizure, advised the DCSS of the error, and demanded refund in full. The DCSS complied and stopped payment on the check to Sherry.

In July 2005, Commissioner Waltz ordered permanent child support of $495 per month and determined child support arrearages to be $82,113.38 as of March 31, 2005.

In March 2006, the bankruptcy trustee filed a motion for an order authorizing the trustee to pay Sherry's proof of claim. There is no copy of the resulting bankruptcy court order in the record. Daniel's bankruptcy estate paid $68,978.79 to Sherry.

III.

The Orders to Show Cause and Trial

In September 2009, Sherry filed an order to show cause to adjudicate support arrearages and medical support (Sherry's OSC), without differentiating between child support arrearages and spousal support arrearages. Sherry's OSC stated arrearages had been adjudicated on July 28, 2005 to be $71,487.48 principal and $10,625.90 interest as of March 31, 2005. Sherry's OSC requested recalculation of interest because the payment from Daniel's bankruptcy estate did not include interest for the period from March 31, 2005 to June 15, 2006. Sherry's OSC also requested a modification of Daniel's payment on arrearages.

The trial on reserved issues in Sherry and Daniel's marital dissolution action was held over several days and submitted on September 23, 2009. The next day, Judge Robert Monarch entered judgment on reserved matters. Among other things not relevant to this appeal, Judge Monarch found Sherry and Daniel both waived the right to future spousal support and Sherry waived her right to spousal support arrearages. As later found by Commissioner Barry S. Michaelson, Sherry's waiver of spousal support arrearages was based on her belief the payment from Daniel's bankruptcy estate was applied first to spousal support arrearages and interest, with any excess applied to child support arrearages and interest. Because the payment from Daniel's bankruptcy estate exceeded the amount of spousal support arrearages, Sherry believed there were no spousal support arrearages when she appeared before Judge Monarch.

Sherry's OSC was heard on over several days in 2009 and 2010 before Commissioner Michaelson. At the hearing on December 11, 2009, Commissioner Michaelson ordered the DCSS to prepare a new accounting of Daniel's arrearages, starting from the July 2005 order adjudicating child support arrearages to be $82,113.38 as of March 31, 2005, calculating interest, and applying the payment from Daniel's bankruptcy estate. At the hearing on March 2, 2010, the DCSS stated Daniel's support

arrearages were $25,023.08 principal and $5,513.73 interest, for a total of $30,536.81. The minute order stated Commissioner Michaelson took the matter under submission after hearing testimony from all parties.

In early 2010, Daniel filed an order to show cause to redetermine arrearages and to reduce his child support obligation (Daniel's OSC).

On March 10, 2010, Commissioner Michaelson signed an intended decision, but did not file it or send it to the parties. There is no reporter's transcript for a child support hearing on this date in the record, but the reporter's transcript for the family law hearing on this date indicates the parties were ordered to report to the child support courtroom. More hearings before Commissioner Michaelson on the issues of arrearages and modification of child support were held on August 3 and November 3, 2010.

IV.

The November 3, 2010 Order

On November 3, 2010, an order was filed on Sherry's OSC and Daniel's OSC. The order stated: "Court denies the modification of child support because of [Daniel's] failure to show a change in circumstance. The guideline calculation ran by the Court shows child support would be $95.00 per month for [Sherry] to pay [Daniel;] however, the Court exercises it's [*sic*] discretion and departs from this order finding [Daniel] has the ability to pay the existing $278.00 per month order. The Court does allocate the existing order as follows: Jacob $102.00 per month and Nicole $176.00 per month. [¶] The Court denies [Daniel's] request to address Epstein credits as that is a community property issue. [¶] Pursuant to the audit, attached to the order as Exhibit '1', the Court determines that child support arrear[age]s, owed to [Sherry], through 10/31/2010 are in the amount of . . . $34,695.61 of which $27,247.08 is principal and $7,448.53 is interest."

The November 3, 2010 order also stated: "Court issued an[] Intended Decision on 03/10/2010 and makes that the order of the court." The intended decision

stated: "This case involves a single issue: How should a payment from [Daniel]'s Chapter 7 Bankruptcy Estate for 'support owed to a spouse, former spouse, or child [11 U.S.C. Sec. 507(a)(7)]' be applied? . . . [¶] Daniel . . . asserts it *must* be applied first to unpaid child support, then to unpaid spousal support. Sherry . . . asserts it *may* be applied first to unpaid spousal support and then to unpaid [child] support." The intended decision then found (1) the bankruptcy trustee paid $68,978.79 to Sherry in June 2006;[3] (2) as of May 31, 2006, total arrearages for spousal support, with 10 percent annual interest, were $43,098.12; (3) total arrearages for child support, with 10 percent annual interest, were $46,059.50; and (4) total arrearages as of May 31, 2006 were $89,157.62.

The intended decision noted that in September 2009, Sherry stipulated before Judge Monarch there were no spousal support arrearages and that "Judge Monarch acknowledged this waiver in his minute order of September 24, 2009." The intended decision then stated: "[Daniel] claims that the June 2006 payment from his bankruptcy was required to be applied first to child support and then to spousal support arrearages. He directs the court's attention to a Minute Order . . . of Hon. James L. Waltz on July 28, 2005, which apparently listed both child support and spousal support arrearages as child support. He then refers to the order of September 24, 2009, from Hon. Monarch as proof that all spousal support is waived. He also testified that sufficient money is still held in the Bankruptcy Trustee account to pay any further child support because it is a surplus estate. The argument fails because it inappropriately would cause a waiver of unpaid spousal support arrearages when it was not intended. A waiver requires knowledge of the right which is waived. There is a lack of proof of such knowledge or a voluntary waiver of spousal support arrearages."

In addition, the intended decision stated the court had discretion to determine priority of payment and exercised its discretion to order the payment from

[3] This handwritten interlineation appears on the intended decision: "Mr. Adler personally paid [illegible] in June 2006."

Daniel's bankruptcy estate be applied first to spousal support arrearages, including interest, and that any excess be applied to child support arrearages. Thus, the trial court expressly found in the November 3, 2010 order that child support arrearages totaled $34,695.61.

In December 2010, Daniel filed a notice of appeal identifying the order entered November 3, 2010 as the order or judgment being appealed.

DISCUSSION

I.

Daniel Has Waived Arguments Based on Sufficiency of the Evidence.

Daniel's appellate brief fails to comply with California Rules of Court, rule 8.204(a)(1)(C), because it does not support references to matters in the record with citations. Indeed, with one exception, Daniel's brief includes no citations to the record whatsoever.

"'The appellate court is not required to search the record on its own seeking error.' [Citation.] Thus, '[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived. [Citation.]' [Citations.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Daniel is not exempt from California Rules of Court, rule 8.204(a)(1)(C) by virtue of appearing in propria persona. (*Nwosu v. Uba*, *supra*, at pp. 1246-1247.) Daniel's violation of rule 8.204(a)(1)(C) is particularly egregious because the clerk's transcript spans eight volumes and is 2,137 pages in length.

We could strike Daniel's brief for noncompliance with the rules of court (Cal. Rules of Court, rule 8.204(e)(2)(B)) but decline to do so because our opinion could affect the well-being of the minor children. Instead, we deem Daniel to have waived any

argument based on the sufficiency of the evidence. (*Nwosu v. Uba*, *supra*, 122 Cal.App.4th at p. 1246.)

II.

The Trial Court Correctly Calculated Support Arrearages Owed by Daniel.

As of May 31, 2006, total spousal support and child support arrearages with accrued interest were $89,157.62. In June 2006, Daniel's bankruptcy estate paid Sherry $68,978.79 toward those arrearages without differentiating between child support and spousal support. In the intended decision, and in the November 3, 2010 order, the trial court concluded Daniel owed Sherry $34,695.61 in child support arrearages. That figure included simple interest from June 2006, less support payments made by Daniel after that date.

Daniel contends the trial court erred in calculating arrearages in the November 3, 2010 order because the payment to Sherry from his bankruptcy estate was applied first to child support arrearages and interest, and paid those arrearages in full. After the payment from the bankruptcy estate, he argues, only spousal support arrearages remained, and Sherry waived spousal support arrearages in September 2009 before Judge Monarch. Therefore, Daniel argues, he owes no arrearages.

Code of Civil Procedure, former section 695.221, subdivisions (a) and (b), which was in effect in June 2006, when the payment from Daniel's bankruptcy estate was made, provided that satisfaction of a money judgment for support must be credited first against the current month's support, then against unsatisfied accrued interest. Any remaining money must be credited against the principal amount of the unsatisfied judgment. (Code Civ. Proc., former § 695.221, subd. (c).) Former section 695.221 did not differentiate between spousal support and child support.

If the payment from Daniel's bankruptcy estate were applied first to spousal support arrearages, then child support arrearages would remain, and Daniel

would be responsible to pay those arrearages with interest. The trial court has discretion to determine the manner of enforcement of a judgment or order made or entered under the Family Code. (§ 290.) Here, Commissioner Michaelson exercised his discretion to apply the payment from Daniel's bankruptcy estate first to spousal support arrearages, thereby leaving unpaid child support arrearages.

If the payment from Daniel's bankruptcy estate were applied first to child support, then spousal support arrearages would remain, and, Daniel argues, Sherry waived spousal support arrearages. "'A waiver is the relinquishment of a known right. "A waiver may occur (1) by an intentional relinquishment or (2) as 'the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.' [Citation.]'" (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583.) "'To constitute a waiver, it is essential that there be an existing right, benefit, or advantage, a knowledge, actual or constructive, of its existence, and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished.'" (*In re Marriage of Paboojian* (1987) 189 Cal.App.3d 1434, 1437.)

"Waiver is an intensely factual determination." (*Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 552; see also *Hefferan v. Freebairn* (1950) 34 Cal.2d 715, 722 ["waiver raises an issue of fact to be decided after a consideration of all the circumstances of the particular case, and is a question primarily for the trial court"].)

Commissioner Michaelson expressly found that Sherry did not make a knowing waiver of spousal support arrearages because she mistakenly believed the payment from Daniel's bankruptcy estate had paid those arrearages. Daniel has waived the argument of insufficiency of the evidence to support Commissioner Michaelson's finding. Thus, assuming the payment from Daniel's bankruptcy estate was applied first

to child support arrearages and interest, Daniel would be liable for the remaining spousal support arrearages, with simple interest at an annual rate of 10 percent.[4]

III.

The Trial Court Erred by Deviating from the Child Support Guideline Formula Without Stating Legally Sufficient Reasons for Doing So.

A.

Background

In October 2006, Commissioner Waltz reduced Daniel's child support obligation to $278 per month beginning in September 2006. In November 2009, Daniel filed a motion to further reduce his child support obligation. The motion was taken off calendar on January 22, 2010 for lack of a proof of service and Daniel's failure to attend a mediation conference, and was refiled that same day as Daniel's OSC.[5]

The November 3, 2010 order denied Daniel's order to show cause to reduce child support payments. Commissioner Michaelson found that Daniel failed to prove a change in circumstances. The guideline formula produced a figure of $95 per month to be paid by Sherry to Daniel, and attached to the November 3, 2010 order is a "Guideline Calculation Results Summary" substantiating the guideline amount of support. Commissioner Michaelson departed, however, from the guideline amount and found that Daniel had the ability to continue paying $278 per month in child support. Daniel argues the trial court erred by denying his request to modify child support.

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[4] We reject Daniel's assertion that compound interest has been charged against the support arrearages. Daniel cites nothing in the record to show he had been charged compound interest, and it appears to us he had been charged simple interest on support arrearages.

[5] According to the Attorney General, "[t]here is no copy of this motion in the record on appeal." The motion is found starting at page 1068 of the clerk's transcript, and Daniel's OSC is found starting at page 1801 of the clerk's transcript.

B.

Standard of Review

We review orders granting or denying a request for modification of child support under the abuse of discretion standard. (*Plumas County Dept. of Child Support Services v. Rodriguez* (2008) 161 Cal.App.4th 1021, 1026.) The trial court's exercise of its discretion must be informed and considered, the court may not ignore or contravene the purposes of the law, and the court's discretion is granted and limited by the statutes and rules regulating child support. (*Ibid.*; *In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1234.) We review the trial court's factual findings for substantial evidence and consider the evidence in the light most favorable to the party who prevailed in the trial court. (*Plumas County Dept. of Child Support Services v. Rodriguez, supra,* at p. 1026.)

C.

"Ability to Pay" Is in Itself Not a Special Circumstance Rebutting the Presumption the Guideline Amount of Child Support Is Correct.

"With certain exceptions not applicable here, the trial court may modify or terminate a child support order at any time the court deems it necessary." (*In re Marriage of Williams, supra,* 150 Cal.App.4th at p. 1234.) "The statutory procedures for modification of a child support order 'require a party to introduce admissible evidence of changed circumstances as a necessary predicate for modification.'" (*Ibid.*) "'The burden of proof to establish that changed circumstances warrant a downward adjustment in child support rests with the supporting spouse.'" (*Ibid.*)

The amount of child support established by the formula of the statewide uniform guideline set forth in section 4055 is presumed to be the correct amount of child support. (§ 4057, subd. (a).) The presumption is rebuttable, affects the burden of proof, and may be rebutted with admissible evidence showing application of the formula would

be unjust or inappropriate in the particular case because one or more of five factors is found to be applicable by a preponderance of the evidence.[6] (§ 4057(b).)

If the court deviates from the guideline, it must state in writing or on the record (1) "[t]he amount of support that would have been ordered under the guideline formula"; (2) "[t]he reasons the amount of support ordered differs from the guideline formula amount"; and (3) "[t]he reasons the amount of support ordered is consistent with the best interests of the children." (§ 4056, subd. (a).) "If the trial court is going to use its discretion to vary the guideline amount, it must make an accurate computation of that amount, then actually use its discretion and state reasons for the variance on the record . . . ." (*In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 145.)

In the November 3, 2010 order, Commissioner Michaelson found that Daniel had failed to show a change in circumstances permitting a modification of child support. Although Daniel has forfeited any challenge to the sufficiency of the evidence to support that finding, it is directly contradicted by Commissioner Michaelson's finding in the next sentence of the order that the statewide guideline formula established monthly child support of $95 to be paid by Sherry to Daniel. The "Guideline Calculation Results Summary" attached to the order substantiates the guideline amount of support. A finding that Daniel failed to show a change in circumstances justifying a modification in child support is, on its face, irreconcilable with a finding the guideline formula dramatically

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[6] Those five factors are (1) "[t]he parties have stipulated to a different amount of child support under subdivision (a) of Section 4065"; (2) "[t]he sale of the family residence is deferred pursuant to Chapter 8 (commencing with Section 3800) of Part 1 and the rental value of the family residence in which the children reside exceeds the mortgage payments, homeowner's insurance, and property taxes"; (3) "[t]he parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children"; (4) "[a] party is not contributing to the needs of the children at a level commensurate with that party's custodial time"; and (5) "[a]pplication of the formula would be unjust or inappropriate due to special circumstances in the particular case." (§ 4057(b).)

modified child support from $278 per month payable by Daniel to $95 per month payable by Sherry.

The guideline figure of $95 per month paid by Sherry to Daniel was presumptively correct. However, Commissioner Michaelson adjusted that figure to $278 per month to be paid by Daniel to Sherry. The only reason given by Commissioner Michaelson for the variance from the guideline was "[Daniel] has the ability to pay the existing $278.00 per month." Commissioner Michaelson did not make the required statement that "[t]he reasons the amount of support ordered is consistent with the best interests of the children." (§ 4056, subd. (a)(3).)

The Attorney General concedes that if we "overlook[] the inadequacies of Daniel's opening brief and reach[] the issue of deviating from guideline child support, remand is required for the trial court to articulate its reasons to deviate or enter a guideline child support order." The appropriate consequence for the inadequacies of Daniel's opening brief—specifically, his failure to cite to the record—is the waiver of any argument based on the sufficiency of the evidence. The dispositive issue is, however, a legal one: Whether a parent's "ability to pay" alone is a special circumstance rebutting the presumption the guideline amount of child support is correct and permitting an upward departure from that amount.

A trial court may depart from the guideline amount of support only in the "special circumstances" set forth in the support statutes. (§ 4052; see *In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747, 753.) Section 4057(b) lists five factors justifying departure from the guideline amount of support. Of those five factors, only the fifth factor arguably is applicable here. It is "[a]pplication of the formula would be unjust or inappropriate due to special circumstances in the particular case." (§ 4057(b)(5).) Section 4057(b) identifies three such special circumstances: "(A) Cases in which the parents have different time-sharing arrangements for different children. [¶] (B) Cases in which both parents have substantially equal time-sharing of the children and one parent

has a much lower or higher percentage of income used for housing than the other parent. [¶] (C) Cases in which the children have special medical or other needs that could require child support that would be greater than the formula amount." The list is not exclusive. (§ 4057(b)(5).)

In two cases, the appellate court approved upward departures from the guideline amount of child support. The court in *In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1356 (*de Guigne*) held the trial court did not abuse its discretion by setting child support in an amount greater than the guideline amount and greater than the paying parent's monthly income. In that case, the father was born into wealth and inherited an estate worth over $20 million. The family lived an opulent lifestyle that far outstripped father's annual income—generated entirely by securities holdings and family trusts—of $240,000. (*Id*. at pp. 1357-1358.) The guideline formula, which was based on the father's income, calculated child support at $4,844 per month. (*Id*. at p. 1358.) The trial court found the guideline amount of child support would not serve the children's best interests and ordered the father to pay $15,000 per month in child support. (*Ibid.*)

The Court of Appeal noted that the parties had cited no published opinion addressing whether special circumstances under section 4057(b) authorized an upward deviation from the guideline amount. (*de Guigne*, *supra*, Cal.App.4th at p. 1361.) The court explained that section 4057(b) provides that any deviation from the guidelines must be consistent with the principles of section 4053, which makes the children's interests a top priority and states that parents should support their children commensurate with their ability. (*de Guigne*, *supra*, at p. 1361.) "These principles," the court concluded, "seem primarily to mitigate against *downward* deviation." (*Ibid*., italics added.)

The Court of Appeal next examined the trial court's reason for deviating upward from the guideline amount. The Court of Appeal agreed with the trial court that a drastic reduction in the children's lifestyle can be a special circumstance justifying a deviation from guideline support (*de Guigne*, *supra*, Cal.App.4th at p. 1361), and each

dollar above the guideline amount need not be earmarked for a specific purpose (*id.* at p. 1364). The Court of Appeal also agreed with the trial court that it was appropriate to consider all of the father's substantial assets in determining his earning capacity because he sheltered and benefitted from those assets. (*Id.* at p. 1362.) The Court of Appeal concluded: "The [trial] court considered [the father]'s circumstances and station in life, his ability to pay support, the best interests of his children and the degree to which his daughters will share in his own standard of living. The special circumstance operative here is not just that the de Guignes lived opulently during the marriage, but also that [the father] has the ability to continue to support his children at quite a comfortable level consistent with his station in life. The [trial] court concluded it would not be in the children's best interest to have their lives changed so radically while their father sheltered, and continued to enjoy, a substantial asset that produced no income." (*Id.* at p. 1366.)

In the other case, *Brothers v. Kern* (2007) 154 Cal.App.4th 126, 136 (*Brothers*), the trial court made a substantial departure upward from the guideline figure of $171 per month by imposing an obligation of $600 per month. To justify this departure from the guidelines, the trial court found that "the child's standard of living could not be sustained if the guideline figure were used," that the father, who was incarcerated, "would no longer be contributing support via visitation," and that the father's standard of living would not be affected because father had no living expenses. (*Id.* at p. 137.) The Court of Appeal held the trial court acted within its discretion by finding the guideline presumption of correctness to have been rebutted based on those factors. (*Ibid.*) In addition, the father had liquidated his assets before incarceration and the proceeds provided sufficient funds for him to pay his criminal defense counsel and to pay child support above the guideline amount under an imputed income theory. (*Id.* at p. 138.)

In neither *de Guigne* nor *Brothers* was the father's ability to pay the sole justification for departing from the guideline amount of child support. In both cases, the trial court made express findings of other special circumstances: In *de Guigne*, the departure upward was necessary to prevent a radical decline in the children's standard of living; in *Brothers*, the departure upward was necessary because the father was incarcerated and therefore would not be contributing to support by visitation. In both cases, the trial court found the departure from the guidelines was in the children's best interests.

Ability to pay a given level of child support is already incorporated into the guideline formula. (§ 4053, subd. (d).) Components of the guideline formula include the high earner's net monthly disposable income (§§ 4055, subd. (a) & (b)(1)(C), 4059) and the total net monthly disposable income of both parents (§ 4055, subd. (b)(1)(E)). Net disposable income is calculated based on annual gross income. (§ 4059.) Section 4058, subdivision (a) defines annual gross income broadly as "income from whatever source derived, except as specified in subdivision (c)," and expressly includes pensions, trust income, annuities, insurance proceeds, and employee benefits in computing the gross annual income of each parent (§ 4058, subd. (a)(1)). The trial court has discretion to consider a parent's earning capacity instead of income, "consistent with the best interests of the children." (§ 4058, subd. (b).)

The trial court has broad discretion to determine when special circumstances apply (*de Guigne, supra,* 97 Cal.App.4th at p. 1361) and the court "is not just supposed to punch numbers into a computer and award the parties the computer's result without considering circumstances in a particular case" (*In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1043). But the trial court's discretion is not boundless; it is limited by the child support laws, their principles, and their purposes. (*In re Marriage of Williams, supra,* 150 Cal.App.4th at p. 1234.) While one such principle is that "[e]ach parent should pay for the support of the children according to his or her ability" (§ 4053,

subd. (d)), another is "[t]he guideline takes into account each parent's actual income and level of responsibility for the children" (§ 4053, subd. (c)). If a parent's ability to pay were a special circumstance sufficient in itself to rebut the presumption that the guideline amount of child support is correct, then ability to pay easily could become an alternative to, or could supplant, the guideline formula as the means of calculating child support.

On remand, the trial court may state reasons to depart from the guideline amount of child support, may enter a guideline child support order, or may consider anew Daniel's order to show cause seeking a modification of child support, and, if appropriate, hold an evidentiary hearing. We express no opinion on the amount of child support for the trial court to set after remand except to point out that a child support order must comply with provisions of the Family Code, including sections 4053, 4055, 4056, and 4057, and must be consistent with this opinion.

III.

Epstein Credits *(In re Marriage of Epstein* (1979) 24 Cal.3d 76) and Other Contentions

Daniel argues Commissioner Michaelson erred by failing to address Daniel's claim his support arrearages should be reduced pursuant to *In re Marriage of Epstein* (1979) 24 Cal.3d 76 (*Epstein*) because he paid expenses relating to a community property house. The November 3, 2010 order states, "[t]he Court denies [Daniel's] request to address Epstein credits as that is a community property issue."

In *Epstein*, *supra*, 24 Cal.3d at pages 83-84, the California Supreme Court held that a spouse may claim reimbursement for amounts spent after separation on preexisting community obligations. These reimbursement credits commonly are referred to as *Epstein* credits. Whether to award *Epstein* credits and their amount is left to the trial court's discretion. (*Ibid.*)

In this case, Commissioner Michaelson is a child support commissioner whose jurisdiction is limited to support issues. (§§ 4250, subd. (a)(1), 4251.) When, as

here, the DCSS intervenes and provides services pursuant to section 4204, any action to modify or enforce child support or spousal support must be heard by a child support commissioner, who acts as a temporary judge unless objection is made. (§ 4251, subds. (b) & (c).) When custody or visitation is in issue, the commissioner shall refer the parents to mediation, accept stipulated agreements, or refer contested issues to a judge or another commissioner. (§ 4251, subd. (e).) *Epstein* credits are a community property issue, and therefore beyond the scope of Commissioner Michaelson's jurisdiction as a child support commissioner.

Daniel contends Commissioner Michaelson ignored his civil rights, took advantage of his self-representation, refused his request for two days' additional time to prepare his case, and displayed open hostility toward him. Daniel presents no record citations to support those contentions, except to cite (his only record citation in the appellant's brief) to a few instances in which Commissioner Michaelson stopped Daniel from speaking longer. In each of those instances, Commissioner Michaelson's conduct was justified. Our review of the record, assisted by the Attorney General's brief, shows that Daniel was permitted to file or present voluminous papers, was permitted to examine Sherry, and testified on his own behalf. A trial court has the authority to regulate the order of proof, provide for the orderly conduct of proceedings, and control the litigation before it. (Evid. Code, § 320; Code Civ. Proc., § 128, subd. (a)(3); *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377.) Commissioner Michaelson did not err in exercising this authority and did not violate Daniel's civil rights.

Finally, Daniel asks us to make various orders and grant him various kinds of relief in the first instance. Our jurisdiction is limited, however, to reviewing the November 3, 2010 order.

DISPOSITION

The portion of the November 3, 2010 order denying Daniel's OSC to modify child support is reversed. In all other respects, the November 3, 2010 order is

affirmed. The matter is remanded for further proceedings consistent with this opinion. In the interest of justice, no party may recover costs incurred on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.